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LIAW CHEE HUEY v. WONG CHIN HEON

HIGH COURT MALAYA, JOHOR BAHRU
TEO SAY ENG J
[ORIGINATING SUMMONS NO: 17D-4-10-2014]
28 MAY 2015

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LEGAL PROFESSION: *Disciplinary committee (DC) – Findings – Recommendations to Advocates and Solicitors Disciplinary Board (ASDB) – Finding of guilt of charge not part of original complaint - Whether DC committed jurisdictional error – Failure to specify and state alleged misconduct in ASDB's order – Whether order of ASDB flawed – Whether prejudicial and unfair to appellant – Whether DC and ASDB acted in breach of rules of procedural fairness and natural justice*

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The respondent engaged the appellant, an advocate and solicitor, practicing in Messrs Wang & SB Wong ('the firm') to act for him in a motor vehicle negligence case in the Sessions Court. The Sessions Court decided in favor of the respondent and awarded him with, amongst others, costs of RM19,596. Inadvertently the costs of RM19,596 was not included in the fair copy of the court order. Subsequently, the respondent settled the firm's bill without protest but proceeded to lodge a complaint with the Advocates and Solicitors Disciplinary Board ('the ASDB'). The respondent's complaint consisted of three charges, namely that the firm had acted negligently by (i) not disclosing the party and party costs they had received from the defendants; (ii) not including the costs into the sealed order; and (iii) receiving costs and not deducting the same from their legal bill to the respondent. The Disciplinary Committee ('DC') found, *inter alia*, that the appellant acted in breach of s. 116(2) of the Legal Profession Act 1976 ('the Act'). In the circumstances, the DC recommended that the appellant be ordered to refund the party and party costs of RM17,588 to the respondent and pay a fine of RM2,000. Subsequently, upon the recommendations of the DC, the ASDB upheld the liability imposed a RM2,000 fine on the appellant. Dissatisfied, the appellant appealed pursuant to s. 103E of the Act to set aside the decision of the ASDB. Amongst the grounds argued by the appellant in setting aside the decision of the ASDB were that (i) the DC had gone beyond the three charges and embarked on other instances of possible misconduct; (ii) the DC had failed to prepare and forward its notes of proceedings to the ASDB pursuant to r. 26(6) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ('the Rules'); and (iii) there was a breach of procedural fairness against the appellant as the alleged misconduct was not clearly stated in the DC's report. The main issue that arose for determination was whether the impugned decision by the ASDB was flawed.

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Held (allowing appeal; setting aside order of ASDB with no order as to cost): A

(1) Although the ASDB is set up by s. 93 of the Act to deal with complaints of misconduct against Advocates and Solicitors, it had to comply with the procedure laid down in the Act and the Rules made thereunder. Under r. 26(2) of the Rules, it was a mandatory requirement for the DC to send a report together with the record of its investigation proceedings to the Director within two months of the date of its appointment. Based on the evidence, the DC had breached r. 26(2) of the Rules in conducting the disciplinary proceedings. (paras 30, 34 & 36) B

(2) When a DC was appointed to conduct an investigation for specific charges based on a complaint properly brought by a complainant with a statutory declaration, the DC's power to conduct the investigation should not necessarily be confined to the said charges framed based on the complaint but to other misconducts disclosed during the investigation. The DC could thus come to a different finding on any alleged misconduct disclosed during the investigative period. As such, the DC in the present case had not committed a jurisdictional error in coming to a finding of breach of s. 116(2) of the Act, which came to light during the investigation into the three charges framed against the appellant. However, the DC having come to a different finding on an alleged misconduct should have framed that charge and read it to the appellant, thereby giving her an opportunity to rebut it. Failure to do would amount to a breach of procedural fairness. (paras 40 & 41) C D E

(3) The DC, had merely reported to the ASDB that the appellant had acted in breach of s. 116(2) of the Act without stating whether the appellant was guilty of the misconduct and without identifying and stating under which limb of s. 94(3) of the Act the alleged misconduct would fall. In the circumstances, the appellant would not know specifically what misconduct was being alleged against her and under which limb of s. 94(3) of the Act she was found guilty. This failure by the DC was seriously prejudicial and unfair to the appellant and would render the ASDB's order bad in law. (paras 42-44) F G

(4) In the absence of the notes of proceedings and in the face of allegation of partiality on the part of the DC, the benefit of doubt should be given to the appellant that she was deprived of her right to an impartial DC. Further the DC's report did not reflect what standard of proof it had applied in arriving at the finding that the appellant was in breach of s. 116(2) of the Act. Therefore, it would be unfair to speculate what standard had been applied by the DC in finding the appellant to be in breach of s. 116(2) of the Act. (paras 46, 47, 49 & 50) H I

Case(s) referred to:

Jebsen & Jessen Engineering (M) Sdn Bhd v. David Sandanasamy & Anor [2010] 6 CLJ 911 CA ***(refd)***

Lim Teng Ee Joyce v. Singapore Medical Council [2005] 3 SLR 709 ***(refd)***

Md Aris Zainal Abidin v. Suruhanjaya Pasukan Polis & Anor [2003] 8 CLJ 360 HC ***(refd)***

Mohd Zamburi Nordin v. Ketua Polis Daerah Segamat & Ors [2005] 6 CLJ 226 HC ***(refd)***

Wong Kok Chin v. Singapore Society of Accountants [1989] 1 LNS 138 HC ***(refd)***

Woon Kwok Cheng v. HR Hochstadt & Ors [1997] 4 CLJ 106 HC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 93, 94(3), 99(4), 103E, 116(2)

Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, r. 26(2)

For the appellant - Bastian Pius Vendargon (PK Nathan & Gene Anand Vendargon with him); M/s Bastian Vendargon

For the Intervener Majlis Peguam Malaysia - Lawrence Chiong Sheng Fan; M/s Chiong & Partners

For the respondent - Not present and not represented

Reported by Vani Krishnan

JUDGMENT

Teo Say Eng J:

Introduction

[1] This is an appeal against the decision of the Advocates & Solicitors' Disciplinary Board (ASDB) made on 13 September 201 pursuant to s. 103E of the Legal Profession Act 1976.

[2] The ASDB had, on 13 September 2014 found the appellant guilty of misconduct and imposed a fine of RM2,000.

[3] Being dissatisfied with the finding of guilt of misconduct and the entire disciplinary process that culminated in the decision, the appellant brought this appeal *vide* original summons to set aside the decision of the ASDB delivered on 13 September 2014.

Brief Relevant Background Facts

[4] The appellant was an advocate and solicitor of the High Court of Malaya, and at the material time, was practicing as a legal assistant in the firm of Messrs Wang & S.B. Wong ("the said firm").

[5] The respondent had engaged the said firm to act for him in a motor vehicle negligence case in the Sessions Court Johor Bahru (the said case).

[6] The appellant was the solicitor handling the said case.

[7] At the end of the trial, the Sessions Court decided the case in favour of the respondent and his wife (the plaintiffs of the case) and gave the following awards:

(i) loss of dependency – RM345,000.00

(ii) funeral Expenses – RM 35,112.60

(iii) special damages as agreed (Items I and II) RM80 and cost of RM19,596.

[8] However the cost of RM19,596.00 was not included in the fair copy of the court order dated 26 January 2010.

[9] The said firm billed for the legal services provided *vide* bill dated 14 June 2011.

[10] The respondent requested the appellant for a discount or reduction of the bill but was told that she was only legal assistant of the said firm and that only the partners could deal with such matters.

[11] The respondent then met a partner of the said firm, one Mr. S.B. Wong and asked whether the fees could be reduced. He was told that as substantial work had been done and the bill was reasonable, no reduction of the fees could be made.

[12] The respondent and his wife thereafter settled the bill without protest.

[13] On 5 June 2012, the respondent lodged a complaint with the Complaints Secretariat, Advocates and Solicitors Disciplinary Board ("ASDB") against the said firm. In the complaint form, he referred to the advocates and solicitors complained of as the appellant and S.B. Wong.

[14] The ASDB registered the complaint as DC/12/7613 and proceeded to refer the complaint to a Disciplinary Committee ("DC") to hear the case and furnish a Report and Recommendation pursuant to the Legal Profession Act 1976 ("the LPA").

[15] The record of complaint in DC/12/7613 was duly furnished to all parties and the case was fixed for hearing before the DC.

[16] The proceedings commenced and at the outset of the hearing of the complaint, the specific grounds of complaint (or charges) against the appellant and S.B. Wong were framed as follows:

(i) Messrs Wang & S.B. Wong, Kulai Branch, was acting negligently as they did not disclose the costs which they (Wang & S.B. Wong) received from the defendants.

(ii) Messrs Wang & S.B. Wong, Kulai Branch was acting negligently in not putting the costs into the sealed Order.

(iii) Messrs Wang & S.B. Wong, Kulai Branch was negligent when they did receive the costs but did not deduct the same from their bill.

A The case was presented on the above three charges negligence, against the said legal firm.

[17] At the conclusion of the hearing, the DC came to the following findings:

B *DC'S Finding Regarding The First Respondent*

(i) as each complaint against an advocate and solicitor must be a personal complaint related to his conduct as an advocate and solicitor, he is not to be held liable for the misconduct (if any) of his partners or legal assistants.

C (ii) since the complainant admitted that the first respondent had never acted for him or dealt with him regarding his case, we are of the view that there is no cause to complain against the first respondent.

(iii) we would therefore recommend that the complaint against the first respondent be dismissed.

D *DC's Finding Regarding The Second Respondent*

(i) in the absence of any agreement on fees, the second respondent ought to charge a reasonable amount of fees for professional work done. Charging RM80,605.84 (excluding disbursements) for a Sessions Court trial appears to us to be high.

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(ii) the bill rendered by the second respondent already mentioned "appeal in High Court" but the second respondent admitted that she charged RM13,434.31 for handling the appeal (see para 17 of her explanation letter at p. 16 record of complaint).

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(iii) as the sealed order (at p. 11 record of complaint) did not mention the amount of costs awarded and paid by the defendants' insurance company, there is doubt as to whether the amount of costs awarded was disclosed to the complainant.

G (iv) if the second respondent intended to ask the complainant to allow her to keep party and party costs in addition to costs agreed to be paid by the complainant, she ought to have asked the complainant to sign a document to say so. She neglected to do so, in breach of s. 116(2) Legal Profession Act 1976.

H (v) having realised that the sealed order was erroneous as it did not state the amount of costs awarded, the second respondent ought to have applied (under the slip rule) to rectify the error and to give the complainant a copy of the same. This she did not do.

I (vi) though the complainant did say under cross-examination that the contents of the second respondent's explanation letter were correct, we have our doubt as to whether he fully understood the contents – especially as he insisted that he was never told.

(vii) an undisputed fact remains that the party and party cost received from the defendant's insurers were kept by the second respondent's firm (Messrs Wong & S.B. Wong) and there is no documentary evidence to prove that the complainant/client agreed and/or was informed about the same.

(viii) though we agree with the submission by the learned counsel for the second respondent that "negligence" is a tort and not a basis for a complaint, we are duty bound to report our findings and to report any conduct in breach of the Legal Profession Act 1976.

(ix) thus, even if the complainant did agree to allow the second respondent to retain party and party costs which she described as "winning costs", she would still have breached s. 116(2) Legal Profession Act 1976 in failing to put the agreement in writing to be signed by him.

> Section 116(2) is a mandatory provision to record any agreement between solicitor and client on costs in a contentious matter and it reads:
>
> > Every such agreement shall be signed by the client and shall be subject to this Part.

(x) by reason of the above, we would recommend that the second respondent be ordered to refund party and party costs RM17,588 to the complainant as she acted in breach of the mandatory provisions of s. 116(2) Legal Profession Act 1976 and further, that a fine of RM2,000 be imposed.

[18] The DC made its report and recommendation dated 29 November 2013 to the ASDB.

[19] The DC recommended that the appellant be ordered to refund the party and party costs of RM17,588 to the respondent, and pay a fine of RM2,000.

[20] *Vide* a letter from ASDB to the appellant dated 20 March 2014, the ASDB affirmed the DC's finding of liability but disagreed with its recommendation on punishment in respect of the appellant.

[21] The ASDB fixed a date for the appellant to appear and be heard.

[22] The appellant through her solicitors filed a submission dated 5 September 2014 and relied on that at the hearing.

[23] On 13 September 2014 at the conclusion of the hearing, the ASDB upheld the liability and imposed a fine of RM2,000 on the second respondent (the appellant).

Appellant's Submissions

[24] The appellant had submitted six grounds of appeal to set aside the decision of ASDB as follows:

A Ground 1

The Disciplinary Committee ("DC") failed to prepare and forward its Notes of Proceedings to the ASDB pursuant to r. 26(2) Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ("LPDP Rules").

B (1) Rule 26(2) LPDP Rules states:

The report of the Disciplinary Committee together with the record of the investigation proceedings shall be sent to the Director within two months from the date of appointment of the Disciplinary Committee.

C The appellant submits that the rule is mandatory based on the following reasons:

(i) Disciplinary proceedings against advocates and solicitors which could result in sanctions/punishments which are capable of affecting the life (and livelihood) of a person, are fundamental rights protected by the Federal Constitution, art. 5. They are at the very D least, *quasi* criminal proceedings.

See: (a) art. 5, Federal Constitution.

(b) *Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhimdantan Pendidikan & Anor* [1996] 2 CLJ 771.

E (c) *Sazali bin Abdullah v. Ketua Polis Negeri Perak* [2007] 2 MLJ 370.

(d) *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v. Utra Badi* [2000] 3 MLJ 281.

Thus an interpretation that the provision is mandatory is warranted.

F (ii) The DB *vide* its letter dated 20 March 2014 informed the appellant that "Further the Board affirmed the disciplinary committees finding of liability ..."

It ought not to so affirm without the benefit of the notes of proceedings. It will become clear why, when the submission that follows is adverted to.

G (iii) The main thrust of the submission for the appellant as would have been obvious to the DB, related to grounds which mandated the DB to call for and look at, the notes of proceedings before affirming the DC's finding of liability.

H Ground 2

The ASDB Failed To Deal With The Issue That The DC's Recommendation On Liability That It Had Upheld, Which Was In Respect Of Alleged Misconduct, Which Was Not In Any One Of The Three Charges Framed Against The Appellant

(1) The DC had at the outset of the inquiry assisted the complainant I to frame his charges of misconduct against the appellant.

(2) The three charges framed, and which the appellant had to answer were:

(i) Messrs Wang & S.B Wong, Kulai Branch, was acting negligently as they did not disclose the costs which they (Wang & S.B. Wong) received from the defendants.

(ii) Messrs Wang & S.B. Wong, Kulai Branch, was acting negligently in not putting the costs into the sealed order.

(iii) Messrs Wang & S.B. Wong, Kulai Branch was negligent when they did receive the costs but did not deduct the same from their bill.

(3) Thus the three charges were charges of alleged negligent conduct.

(4) At the conclusion of the hearing before the DC it was submitted for the appellant that the three complaints all related to negligence simplicier (not gross negligence) and were directed against a law firm (in which the appellant was only a legal assistant and not a partner) and as such, there was no "misconduct" within the meaning of s. 94(3) of the LPA.

(5) In essence, s. 94(3) LPA sets out categories or instances of "misconduct".

(6) Negligence *simpliciter* alleged against a firm of solicitors may be actionable in a court of law but is not "misconduct" within the meaning of s. 94(3) LPA.

(7) The DC made light of this submission by saying in its report:

(viii) Though we agree with submission by Learned Counsel for the 2nd Respondent (Appellant here) that negligence is a tort not a basis for a complaint, we are duty bound to report our findings and to report any conduct in breach of the Legal Profession Act 1976.

This results in a breach of procedural fairness. The appellant met the charges framed. She did not know of any other alleged conduct that the DC was looking at, behind her back.

(8) The DC then went on to find that the appellant had breached s. 116(2) LPA 1976 by failing to put in writing the agreement for the complainant to sign.

(9) The ASDB did not at all consider and deal with our complaints that the DC had erred in the following material aspects:

9.1 The DC could not embark on a finding in respect of anything it liked in the nature of a fishing expedition, when the complaint was specifically crystallized in the form of three charges and nothing else.

To do so would be to enquire "behind her back" and is procedural unfairness.

9.2 Once the three charges brought by the complainant, were responded to by the solicitor (appellant here) and proved not to constitute "misconduct" within the meaning of s. 94(2) LPA,

A then the DC had no jurisdiction to embark on a fishing expedition for other instances of possible misconduct which the complainant himself had not brought nor affirmed a statutory declaration on, as mandated by the LPA and Rules made thereunder.

B 9.3 Referring to a breach of s. 116(2) LPA was *per se* an error, as that "charge of misconduct" was neither framed nor posed to the appellant.

9.4 Notwithstanding para 9.3 above, even if we look at s. 116(2) LPA, it does not apply to this case.

C – The facts of this case were that the winning costs from the insurers were to be retained by the firm, as agreed to at the outset.

– However, the quantum of fees charged was found in the bill/ invoice issued to the complainant and his wife (the clients).

D – The legal firm (as well the appellant of course) were not relying on any agreement for fees.

– The complainant approached a partner of the firm, S.B. Wong, for a reduction in the invoiced amount but was told that the sum billed was reasonable and no discount could be given.

E – Thus, from the facts it is clear that s. 116(2) LPA has no place to play in these proceedings.

9.5 The other erroneous "finding" of the DC was that, the fees charged ought to be a reasonable amount of fees for professional work done, and in this case the DC felt that the
F fees charged "appears to us to be high".

With respect, that is not a "misconduct", nor was that a charge leveled against the appellant. Further, if a complainant feels a bill/invoice is too high and a discount is refused, he has a legal remedy at law, namely to invoke ss. 126 to 135 LPA, namely to
G have the bill of costs taxed on solicitor-client basis.

It is not to treat a bill which a client feels as claiming high fees, as a "misconduct".

Thus it was a jurisdictional error by the DC, and by extension by the ASDB.

H Ground 3

The ASDB Issued An Order Purportedly Pursuant To s. 103D LPA Dated 13 September 2014, Which Is Fatally Flawed As It Does Not Identify And State What Is The "Misconduct" In s. 94(3)(a) – (o) LPA That The Appellant Is Guilty Of

I (1) The Order of 13 September 2014 is in the second affidavit of Liaw Chee Huey affirmed on 12 November 2014, in TAB J of that affidavit.

(2) It orders (as against the appellant) a penalty of RM2,000 and in default a suspension.

(3) Nowhere does it state that the appellant has been found guilty of misconduct (although it may be suggested that it is implied), but more seriously, does not stipulate the "misconduct" in s. 94(3) LPA of which the appellant is found guilty.

(4) Section 103D LPA is the provision for the ASDB to consider the report of the DC and make its order.

(5) If in this case, as demonstrated, there is grave doubt as to what "misconduct" was being alleged against the appellant, and what "misconduct" was found as charged and/or proved. Thus, failure to state this is a fatal flaw and the order is bad in law.

(6) The DC went on a frolic of its own, and found two possible instances of alleged "misconduct", namely:

(a) Breach of s. 116(2) LPA; and

(b) Charging high fees.

(7) As to what was the "misconduct" that the ASDB found against the Appellant, to enable her to know specifically what to appeal against, we are all unable to fathom.

(8) In such circumstances, it is submitted that it is imperative for the ASDB to make a specific finding of what is the "misconduct" within the ambit of s. 94(3) LPA that the Appellant is guilty of, when it issues its s. 103D LPA Order.

(9) The failure to do so renders the Order bad in law, and seriously prejudicial and unfair to the appellant.

(10) It must be noted that the appellant, a legal assistant, was clearly not in control of any billings of the firm, nor does she receive the benefit of any of the fees directly. (See also unrebutted evidence that the appellant had no power to deal with such matters, as set out in paras. 6 to 8 affidavit in support (3.10.2014).

Ground 4

The ASDB Is In Breach Of s. 99(4) Of The LPA As The Complaint Was Against A Legal Firm, And The Legal Firm Was Never Asked To Satisfy The ASDB Of The Identity Of The Particular Advocate/s And Solicitor/s Against Whom The Complaint Lies. The Complaint Was Dealt With On Speculation Against The Appellant, The Legal Assistant

(1) Section 99(4) LPA stipulates the procedure where a complaint is made against a legal firm.

(2) However, it appears from the letter of complaint and the charges framed that the charges are levelled against a firm Wang & S.B. Wong, Kulai Branch.

(3) No attempts were made to ascertain all those responsible, but since 1 partner and 1 legal assistant had dealings with the complainant, and their names appeared in the complaint, proceedings were only against them.

(4) However, if the dispute revolves around billings, costs, etc, then the partners of the firms need to answer, and not a legal assistant who has no stake in the fees.

(5) No steps were taken to ascertain all the persons who should meet the charges/complaint pursuant to s. 99(4) LPA.

Ground 5

The Chairman Of The DC Cross-examined The Appellant At Length Till The Counsel For The Appellant Objected

(1) This would have been evident from the notes or recording of proceedings, if the DC had forwarded the same to the ASDB, which it did not.

(2) This was a clear indication of a lack of impartiality by the Chairman and his committee members.

(3) The Chairman also went back to questioning the complainant after he had closed his case, and during the respondent's case. These would, and should have been reflected in the recordings of proceedings, if they had been furnished to the ASDB.

(4) The above, coupled with failure to furnish notes of proceedings, as well as departure without notice from the framed charges, is a breach of procedural fairness (natural justice).

See: (i) *Mohd Zamburi Nordin v. Ketua Polis Daerah Segamat & Ors* [2005] 6 CLJ 226.

(ii) *Lim Teng EE Joyce v. Singapore Medical Council* [2005] 3 SLR 709.

(iii) Also the cases cited earlier on constitutional protection and procedural fairness.

It is also submitted that a breach of procedural fairness results in a court hearing an appeal (or judicial review) setting aside that order which is challenged (or quashing it):

See: (i) *Jebsen & Jessen Engineering (M) Sdn Bhd v. David Sandanasamy & Anor* [2010] 6 CLJ 911; [2010] 5 MLJ 628.

(ii) *Md. Aris Zainal Abidin v. Suruhanjaya Pasukan Polis & Anor* [2003] 8 CLJ 360; [2003] 6 MLJ 521.

(iii) *Woon Kwok Cheng v. HR Hochstadt & Ors* [1997] 4 CLJ 106; [1997] 2 MLJ 795.

Ground 6

Both The DC And The ASDB Failed To Advert To, And Comply With The Need For Cases Of This Nature, To Meet The Higher Standard Of Proof

(1) The DC as well as ASDB do not at all refer to the higher standard of proof (or any standard of proof for that matter) required to be discharged before a finding of "misconduct" is made.

(2) It is submitted that the case and evidence presented here should have been scrutinised and evaluated on a higher standard of proof.

See: *Wong Kok Ching v. Singapore Society of Accountants* [1990] 1 MLJ 456.

(3) Failure to do so, renders the findings and order made, bad.

Summing Up

(1) The above grounds of appeal demonstrate, *inter alia*, breaches of procedural fairness and natural justice, thereby threatening to infringe the fundamental rights of the appellant under the Federal Constitution (arts. 5 and 8).

(2) The above also demonstrate breaches of the LPA and Rules made thereunder.

(3) They also demonstrate a failure to adhere to the proper standard of proof where misconduct in a *quasi* criminal inquiry is to be considered.

(4) By reason of the above it is respectfully submitted that the appeal ought to be allowed and the Order of the ASDB dated 13 September 2014 be set aside, with the appropriate order as to costs.

Intervener's Submission

[25] The intervener submits that where the High Court is hearing an appeal against the decision of ASDB, it must be guided by the following principles:

(1) Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the Court and not the profession that will determine the yardstick of professional behaviour.

In our judgment, a Court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.: See *Gana Muthusamy v. Tetuan Lim Ong & Co* [1998] 2 MLRA 208.

A (2) Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.

B A relationship of trust and confidence between the Courts and the members of the Bar is essential for the due administration of justice in this country, and that relationship would be impaired if, on any but the most compelling grounds, the Courts were to interfere with the finding of the committee in a matter so peculiarly its concern: *See Au Kong Weng v. Bar Committee Pahang* [1980] 1 MLRA 475.

C (3) Disciplinary proceedings ... are designed to enable members of the same profession to decide on the fate of their fellow practitioners. This is simply because members of the same profession should know and appreciate better than anyone else the standards of conduct expected of the legal profession. The DB, ... consists of senior members of the Bar appointed under Section 93(3) of the Act ... The D DB should know better. (emphasis added): See *Marzaini bte Zainuddin v. Majlis Peguam Malaysia* [2006] 3 MLRH 627.

[26] The intervener submits that the above case law has established that an appellant court could only intervene in an exceptional case: *See Koh Mui Tee v. Chin Lee & Ors* [2014] MLRAU 1. E

[27] The intervener submits that the appellant failed to establish an exceptional case in this appeal for the following reasons:

(a) The appellant has been given a right to be heard during the enquiry conducted by the DC and was legally represented by an experienced and F competent lawyer.

(b) The DC has reached an impartial and final finding that the appellant has breached s. 116(2) of the LPA 1976 by taking into account the following facts:

G (i) the appellant had admitted her mistake in not inserting the cost of the suit in the fair order. She also chose not to rectify the court order under the slip rule.

(ii) the appellant failed to disclose to the respondent the party and party cost amounting to RM17,588 which was received by the appellant's H legal firm. Moreover, the appellant had billed the respondent the advocacy cost amounting to RM88,464.19 without deducting the said party and party cost.

(iii) the appellant failed to obtain a written agreement from the respondent to entitle her legal firm to keep the party and party cost. I

(c) The DC then forwarded its report and recommendation to the ASDB.

(d) The ASDB after considering the report by DC and its recommendation has affirmed the DC's decision on liability.

(e) The ASDB has also considered the seriousness of the case, the nature and circumstances of the misconduct and imposed a fine of RM2,000 on the appellant.

[28] For the aforesaid reasons, intervener submits that the disciplinary proceedings were conducted impartially and were in order. There was no element of any procedural defect which will justify the High Court to interfere with the finding on liability and the fine imposed by the ASDB.

Ruling Of The Court

[29] Having heard the submissions by both the parties, I find that the intervener's submission mainly dealt with how the DC had come to the finding of liability for a breach of s. 116(2) of the LPA by the appellant at the end of the inquiry which was not the subject-matter of the three charges of negligence framed by the DC at the beginning of the inquiry. Neither did the intervener rebut the pertinent issues raised by the appellant in this appeal.

[30] The ASDB which is set up by s. 93 of the LPA is empowered to deal with complaints of misconduct against advocates and solicitors.

[31] Section 94 sets out the parameters of the powers of the ASDB to take disciplinary action against solicitors with regard to complaints of misconduct. Misconduct is defined in s. 94(3) to mean "conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes specific conducts set out in sub-s. 94(3)(a) to (o).

[32] The disciplinary proceedings against the appellant are governed by the provisions in Part VII of LPA 1976 which clearly provide the procedure on how to conduct an investigation into a complaint of misconduct lodged by the respondent.

[33] This court is always cautious when entertaining an appeal against the decision of the ASDB which was entrusted to decide on the fate of their fellow practitioners on matters of discipline. The court is always mindful that the ASDB which is entrusted with the supervision of advocates and solicitor's conduct should know and appreciate better than anyone else the standard of conduct expected of the legal profession: *Au Kong Weng*'s case, supra. Hence the court will not interfere with the merits of decision of the ASDB.

[34] However, since this is a disciplinary matter entrusted to ASDB governed by the provision of LPA 1976, the court will look into the decision making process of ASDB to ensure that it has followed the procedure laid

down and complied with the minimum standards consistent with the administrative good governance. Categories of such minimum standards are, among others:

(i) the decision making body shall not act *ultra vires* its power prescribed by the statute governing it.

(ii) it shall act within its jurisdiction.

(iii) it shall not commit any form of error of law material to the decision.

(iv) it shall address relevant considerations and not address irrelevant considerations.

(v) it shall comply with the rules of natural justice that is, the right to be heard on the part of the aggrieved person and the right to an impartial tribunal.

[35] The court has to deal with the issues raised by the appellant in determining whether the impugned decision by ASDB is flawed on any of the aforesaid grounds.

Issue No. 1

The Disciplinary Committee ("DC") Failed To Prepare And Forward Its Notes Of Proceedings To The ASDB Pursuant To r. 26(2) Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ("LPDP Rules")

[36] Rule 26(2) LPDP Rule has imposed a duty on the DC to sent its report together with the record of the investigation proceedings to the director within two months from the date of the appointment of the DC. This is the mandatory requirement which must be complied with by the DC. Failure to forward a copy of the record of the investigation proceedings will certainly deprive the ASDB the benefits of evaluating the evidence gathered during the investigation proceedings in respect of the alleged misconduct before affirming the DC's finding of liability on the alleged misconduct. I therefore rule that the DC has breached r. 26(2) LPDP in conducting the disciplinary proceedings.

Issue No. 2

The DB Failed To Deal With The Issue That The DC's Recommendation On Liability That It Had Upheld, Which Was In Respect Of Alleged Misconduct, Which Was Not In Any One Of The Three Charges Framed Against The Appellant

[37] It is not disputed that at the outset of the enquiry, three charges of misconduct were framed against the appellant.

[38] The three charges were related to negligence and were directed against Messrs Wang and S.B. Wong, Kulai Branch, a legal firm.

[39] However, at the end of the investigation the DC had come to the finding that the appellant was in breach of s. 116(2) LPA which is not one of the three charges of negligence framed against the appellant.

[40] Be that as it may, I do not agree with the contention of the appellant that this is a jurisdictional error by the DC and by extension the ASDB when it has come to a finding of other alleged misconduct apart from the three charges on the ground that the alleged misconduct was not complained by the respondent nor affirmed in a statutory declaration as mandated by the LPA and the Rules made thereunder. I am of the considered view that the said contention of the appellant is misconceived. When a DC is appointed to conduct an investigation for specific charges based on a complaint properly brought by a complainant with a statutory declaration, the DC's power to conduct the investigation should not necessary be confined to the said charges framed based on the complaint but to other misconducts disclosed during the investigation. The DC can come to a different finding on any alleged misconduct disclosed during the investigation provided that the original complaint where the three charges were framed was properly brought and affirmed in a statutory declaration. I therefore rule that the DC has committed no jurisdictional error in coming to a finding of breach of s. 116(2) of the LPA other than the three charges framed.

[41] However, the DC having come to a different finding on an alleged misconduct must frame a charge and read it to the appellant giving her an opportunity to rebut. Failure to do so is a breach of procedural fairness.

Ground 3

The ASDB Issued An Order Purportedly Pursuant To s. 103D LPA Dated 13 September 2014, Which Is Fatally Flawed As It Does Not Identify And State What Is The "Misconduct" In s. 94(3)(a) – (o) LPA That The Appellant Is Guilty Of

Ruling Of The Court

[42] Having perused the affidavits enclosed and the supporting documents, I find that the DC had merely reported to the ASDB that the appellant acted in breach of s. 116(2) LPA 1976 without stating that the appellant was guilty of the alleged misconduct and without identifying and stating under which limb of s. 94(3) LPA that the alleged misconduct would fall.

[43] In the circumstances, the appellant would not know specifically what "misconduct" was being alleged against him and under which limb of s. 94(3) LPA was he found guilty.

[44] I agree with the appellant that failure to do the above is seriously prejudicial and unfair to the appellant and would render the order of ASDB bad in law.

Ground 4

The ASDB Is In Breach Of s. 99(4) Of The LPA As The Complaint Was Against A Legal Firm, And The Legal Firm Was Never Asked To Satisfy The ASDB Of The Identity Of The Particular Advocate/s And Solicitor/s Against Whom The Complaint Lies. The Complaint Was Dealt With On Speculation Against The Appellant, The Legal Assistant

Ruling Of The Court

[45] Having heard the submission by the appellant, I do not agree with the appellant that the legal firm was never asked to satisfy the ASDB of the identity of the particular advocate and solicitor against which the complaint lies. I am satisfied that there was no breach of s. 99(4) of the LPA since the names of one partner and one legal assistant appeared in the complaint and the proceedings were only against them. No objection was raised that the wrong parties were brought before the DC.

Ground 5

The Chairman Of The DC Cross-Examined The Appellant At Length Till The Counsel For The Appellant Objected

Ruling of the Court

[46] Having perused the documents tendered, I agree that the record of proceedings is crucial in determining whether the chairman and his committee members lacked impartiality in conducting the investigation in the face of the allegations that the chairman of the DC cross-examined the appellant at lengthy till the counsel for the appellant objected and the chairman also went back to questioning the complainant after he had closed his case and during the appellant's case.

[47] In the absence of the notes of proceedings and in the face of allegation of partiality on the part of the DC, the benefit of doubt should be given to the appellant that he was deprived of his right to an impartial DC.

Ground 6

Both The DC And The ASDB Failed To Advert To, And Comply With The Need For Cases Of This Nature, To Meet The Higher Standard Of Proof

Ruling Of The Court

[48] I agree that in view of the seriousness of the alleged misconduct, the DC would have to apply a higher standard of proof and not to arrive at a finding of guilt on a balance of probabilities: See *Wong Kok Chin*'s case, *supra.*

[49] However, a perusal of the DC's report does not reflect what standard of proof has been applied in arriving at their finding that the appellant was in breach of s. 116(2) LPA.

[50] It is therefore not fair to speculate here as to what standard has been applied by the DC in finding that the appellant was in breach s. 116(2) LPA.

Decision

[51] For the above reasons, I rule that the order of ASDB is flawed on the ground of breaches of procedural fairness and natural justice. I therefore allowed the appeal and set aside the order of ASDB with no order as to cost. I also order that the fine which was paid by the appellant to be refunded to her.